IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 19, 2008 Session

**STATE OF TENNESSEE v. DAVID LAWRENCE JONES**

**Appeal from the Circuit Court for Dickson County**
**No. CR8943 George Sexton, Judge**

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**No. M2008-00985-CCA-R3-CD - Filed August 21, 2009**

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DAVID H. WELLES, J., dissenting.

**DISSENTING OPINION**

I agree that Officer Ethridge seized the Defendant and that the informant in question was anonymous and thus unentitled to a presumption of reliability. I cannot, however, conclude that Officer Ethridge had specific and articulable facts justifying a reasonable suspicion that a crime had been, was being, or was about to be committed. See Terry v. Ohio, 392 U.S. 1, 21 (1968). I would reverse the judgment of the trial court and order that the charges against the Defendant be dismissed.

**I. Reliability**

Tennessee courts apply the two-pronged Aguilar-Spinelli test in judging whether information obtained from an informant is sufficiently reliable to provide probable cause for issuance of a warrant. State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989). See also Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). As the majority notes, we also consider the Aguilar-Spinelli analysis "useful in considering the reliability of a tip" in the context of an investigatory stop. State v. Pulley, 863 S.W.2d 29, 31 (Tenn. 1989). That test requires that both an informant's basis of knowledge and reliability be established. Jacumin, 778 S.W.2d at 432.

I agree that the informant established an eyewitness basis of knowledge given that he or she reported the Defendant's conduct at or near the time of its occurrence; in other words, the informant established that he or she gained the information, assuming its truth, by observing the Defendant. See Pulley, 863 S.W.2d at 32.

I cannot agree that the informant's reliability was established, however. Officer Ethridge received information that a "white male[] with medium length hair" driving "an 80's model[] Oldsmobile" was involved in a "disturbance at the Pleasant Valley Apartments" and was "possibly intoxicated." Officer Ethridge also received information that the subject was going to be at Tices Springs Market. Involvement in an unspecified "disturbance" is not a crime. Officer Ethridge

corroborated the informant's report of the Defendant's location, appearance, and vehicle description; these facts, however, also do not relate to the commission of a crime. The majority concludes that Officer Ethridge's corroboration of these details was sufficient to also corroborate the informant's report of "possible" drunk driving. The United States Supreme Court has stated, however, that

> [a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Florida v. J.L., 529 U.S. 266, 272 (2000). Officer Ethridge had no corroboration of the truth of the informant's allegations of "possible" criminal activity before initiating the investigatory stop.

The majority also analyzes the informant's reliability by focusing on "the level of danger that the tip reveal[ed]." Pulley, 863 S.W.2d at 32. I agree with the majority's citation of State v. Wilhoit for the proposition that drunk driving poses a serious threat to public safety. In upholding the constitutionality of the investigatory stop in Wilhoit, however, we noted that the officer therein "did not make the investigatory stop based solely on the information provided by the unknown caller. Instead, [the officer] observed the [d]efendant to corroborate the caller's information [regarding a potential drunk driver]." Wilhoit, 962 S.W.2d at 488. We also noted that this corroboration distinguished Wilhoit from another of our cases, State v. James Chester Cobb, No. 01-C-019011CC00308, 1991 WL 71910 (Tenn. Crim. App., Nashville, May 7, 1991), in which we held unconstitutional an investigatory stop prompted by nothing more than "a dispatch that a possible drunken driver was operating a Ford pickup truck in an easterly direction on Highway 100." Id. at *1; see also Wilhoit, 962 S.W.2d at 488. The instant case is indistinguishable from Cobb.

Further, Pulley does not stand for the proposition that relatively minor intrusions or brief detentions trivialize the reliability requirement. In Pulley, our supreme court addressed the narrow issue of whether an anonymous tip alleging that the defendant possessed and intended to use a concealed weapon was sufficient for an investigatory stop. Pulley, 863 S.W.2d 29, 29-30 (Tenn. 1993). Before concluding that, "given the threat of violence, the police had 'specific and articulable facts' to warrant the investigatory stop," id. at 34, the court noted the "unappealing choice" faced by officers who receive information regarding threats of violence:

> Either they stopped [the defendant] on the basis of the tip as corroborated by their observation or they could at best follow him through the streets of [the town] hoping he would commit a crime, or at least brandish the weapon, out of doors, rather than walking inside a dwelling, and thus beyond police purview, before putting the shotgun to its intended use.

Id. (quoting U.S. v. McClinnhan, 660 F.2d 500, 502-03 (D.C. Cir. 1981)). In this case, Officer Ethridge faced no such unappealing choice, as he easily could have observed the Defendant for corroboration of facts indicating intoxication. The reliability requirement thus remains in full force.

Even if a report of a "possibly" intoxicated driver indicates as much danger as a report of a subject intending to use a concealed firearm, and if the reliability requirement is therefore lessened, the United States Supreme Court has indicated disapproval for the McClinnhan court's reasoning:

> [A]n automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.

J.L., 529 U.S. at 272-73. In my view, Officer Etheridge had insufficient information to conclude that the unknown caller was a reliable informant.

**II. Reasonable Suspicion**

Even if the informant's reliability were established, however, his or her tip would not have provided what is required for reasonable suspicion: specific and articulable facts justifying a belief that a crime had been, was being, or was about to be committed. Terry, 392 U.S. at 21 (1968). Officer Ethridge could only have relied on the Defendant's reported status as a "possibly intoxicated driver"; this statement, however, does not provide any specific and articulable fact. It is merely the informant's opinion, itself potentially based on specific and articulable facts observed by the informant but apparently unreported to the police. I do not take issue with Officer Ethridge's interest in observing the Defendant based on this information. I conclude, however, that he was constitutionally prohibited from initiating an investigatory stop before gaining the specific and articulable facts required by Terry.

**Conclusion**

Based on the above authorities and reasoning, I respectfully dissent.

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DAVID H. WELLES, JUDGE